

CALIFORNIA COASTAL COMMISSION

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Staff: Meg Vaughn-LB
Staff Report: 10/26/06
Hearing Date: 11/14-17/06
Commission Action:

STAFF REPORT: REGULAR CALENDAR

APPLICATION NUMBER: 5-05-479

APPLICANT: Donald Goodell

AGENT: Douglas Goodell & Stuart Goodell

PROJECT LOCATION: Near the intersection of Bolsa Chica Street and Los Patos (APN 110-014-20), in unincorporated Orange County.

PROJECT DESCRIPTION: Plant one mature Monterey Pine tree, a second smaller Monterey Pine, one native fruiting tree, two Western Sycamore trees, two Catalina Cherry trees, and two Toyon shrubs intended to replace the loss of a Monterey Pine tree, a portion of a second Monterey Pine tree, and an ornamental tree.

SUMMARY OF STAFF RECOMMENDATION:

Staff is recommending the Commission **approve** the proposed project subject to four special conditions which are necessary to assure that the project conforms with Section 30240 of the Coastal Act regarding protection of environmentally sensitive habitat areas.

Special Condition No. 1 requires submittal of a Revised Biological Assessment and Landscape Maintenance Plan. Special Condition No. 2 requires that all prior to issuance requirements be completed within a specified time frame. Special Condition No. 3 requires the commencement of development in a specified time frame. And Special Condition No. 4 requires any changes to the approved final plan require approval be obtained from the Executive Director, and may require approval of the Commission.

LOCAL APPROVALS RECEIVED: None

SUBSTANTIVE FILE DOCUMENTS: Biological Assessment, Goodell Property, Bolsa Chica Mesa, Orange County, California, prepared by LSA, dated March 2006.

STAFF NOTE: The applicant removed one Monterey Pine tree entirely, the secondary trunk of a second Monterey Pine tree, and one fruiting and flowering ornamental tree believed to have been a Chinese fig. The tree removal occurred without benefit of a coastal development permit. This replacement of trees proposed in this application is intended to offset the ecological harm caused by the previous tree removal and to resolve the Coastal Act violation.

This matter was previously scheduled for Commission hearing on July 12, 2006. At that time, the applicant was proposing to plant only the two Western Sycamores, two Catalina Cherries, and two Toyon shrubs. At that hearing, significant concerns were expressed regarding the fact that no in-kind tree replacement (including in the size and location) was proposed. Discussion at the hearing raised the issue that in addition to the trees then proposed (which are considered necessary to help offset the impacts of interim habitat loss), it would be necessary to replant two Monterey Pines and one native fruiting tree in the same location as that from which the trees were removed. In addition, the size of the replacement Monterey pines should be as close as possible to the size of the pines removed. Unless this aspect of the project is included, there are concerns that the adverse impacts due to the unpermitted development would not be mitigated, and the violation that occurred in cutting the trees would not be resolved. The issue of whether a habitat buffer should be placed at the location where the Monterey pines were removed was also discussed at the July hearing. Appropriate habitat buffers should be decided at the time a development proposal is considered for the site, at which time a full biological assessment would be undertaken.

Based on concerns expressed by the Commission at the July hearing, the applicant has revised the proposed project to include, in addition to the sycamores, Catalina cherries, and toyons, a proposal to plant one mature Monterey Pine tree, a second smaller Monterey Pine tree and one native fruiting tree in the immediate location of the trees that were removed.

I. APPROVAL WITH CONDITIONS

STAFF RECOMMENDATION:

Staff recommends that the Commission **APPROVE** the permit application as conditioned.

MOTION: *I move that the Commission approve Coastal Development Permit No. 5-05-479 pursuant to the staff recommendation.*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO APPROVE THE PERMIT:

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. STANDARD CONDITIONS:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date this permit is reported to the Commission. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and Conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

III. SPECIAL CONDITIONS:**1. Landscape Maintenance Plan**

- A. **Prior to issuance of the coastal development permit and within 60 days of the date of Commission action on this permit**, the applicant shall submit for the review and approval of the Executive Director:
 - a. A Revised Biological Assessment that incorporates the proposed planting of one mature Monterey Pine tree, a second smaller Monterey Pine tree and one native fruiting tree in the same location as the trees that were removed, in addition to the originally proposed plants.

- b. A Landscape Maintenance Plan that incorporates the requirements of the Biological Assessment prepared for the Goodell Property, Bolsa Chica Mesa, Orange County, prepared by LSA, and dated March 2006, as outlined on page 14 of the LSA report.
 - c. The Revised Biological Assessment and Landscape Maintenance Plan shall include, subject to review and approval of the Executive Director, a site plan that clearly depicts the location of all proposed plantings, and shall specifically indicate that one mature Monterey Pine tree, a second smaller Monterey Pine tree and one native fruiting tree are to be planted in the same location as the two Monterey Pines and one fruiting, flowering ornamental that were removed.
- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

2. Condition Compliance

Within 60 days of Commission action on this coastal development permit application, or within such time as the Executive Director may grant for good cause, the applicant shall satisfy all requirements specified in the conditions hereto that the applicant is required to satisfy prior to issuance of this permit. Failure to comply with this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act.

3. Commencement of Development

The applicant shall commence the development approved by this permit no later than sixty (60) days from issuance of the coastal development permit by the Executive Director, unless the Executive Director grants an extension of this deadline for good cause.

4. Changes to Approved Plan

Any changes to the approved final plans and/or any cessation of work prior to completion shall be reported to the Executive Director. All development must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth herein. Any deviation from the approved plans must be reviewed and approved by the Executive Director and may require Commission approval.

IV. FINDINGS AND DECLARATIONS:

The Commission hereby finds and declares:

A. Project Description & Location

The applicant proposes to plant two Monterey Pine trees, one native fruiting tree, two Western Sycamore trees, two Catalina Cherry trees, and two toyon shrubs to replace the loss of one Monterey pine tree, the secondary trunk of a second Monterey Pine tree, and one fruiting and flowering ornamental tree believed to have been a Chinese fig. The two Monterey Pine trees and one native fruiting tree are proposed to be planted in the same location as the trees that were removed. One Monterey Pine tree is proposed to be a mature tree, similar in size to the Monterey Pine that was completely removed. The applicant is proposing to plant the trees and shrubs to restore the habitat that was lost when the trees were removed without a valid coastal development permit. The development is proposed in unincorporated area of Orange County near the intersection of Bolsa Chica Street and Los Patos Avenue (APN 110-014-20).

The subject site is a 6.2 acre, largely undeveloped parcel within an unincorporated area of Orange County. The site is within the County's Bolsa Chica LCP segment. It is located between the area known as "Parkside" which is in the City of Huntington Beach, and the recently approved Brightwater project site (currently under construction) in the County. The East Garden Grove-Wintersburg County Flood Control Channel is located further to the south of the subject property. Also in close proximity to the site is the Bolsa Chica restoration area. (See exhibit A).

Removal of the trees required approval of a coastal development permit, because the "removal or harvesting of major vegetation other than for agricultural purposes" is considered development under the Coastal Act definition (Section 30106). The trees that were removed are considered "major vegetation" because they were adult trees that provided habitat, perches, foraging opportunities and shelter for raptors and other wildlife. In addition, these trees are adjacent to recognized "Eucalyptus grove ESHA" (whose trees have been determined to provide an environmentally sensitive habitat area), and to the environmentally sensitive habitat areas and wetlands within the Bolsa Chica restoration area, and the removed trees served wildlife, particularly raptors, from these habitats. A pair of White-tailed kites are known to have nested in the felled Monterey pine. White-tailed kites are a California Department of Fish and Game Fully Protected status species. This application only includes planting of the new trees and shrubs; it does not propose the unpermitted removal of the Monterey pines and ornamental tree.

B. Standard of Review

The subject site is located in an unincorporated area of Orange County. The County has divided its LCP areas into geographical segments. The subject site is located in the Bolsa Chica LCP segment. The Bolsa Chica LCP area has a long and controversial history. Despite a number of submittals by the County and a number of actions by the

Commission, as well as more than one court action, no final LCP certification has occurred for this area. The Commission's most recent action on the LCP, approval subject to suggested modifications, was never accepted by the County and thus lapsed. Nevertheless, that most recent LCP action by the Commission provides guidance for development within the Bolsa Chica area.

The standard of review for coastal development permits in the Bolsa Chica LCP area remains the Chapter 3 policies of the Coastal.

C. Environmentally Sensitive Habitat Areas

Section 30240 of the Coastal Act states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

Section 30240 of the Coastal Act limits the amount and types of development that may occur within and adjacent to an environmentally sensitive habitat area (ESHA). The Coastal Act defines environmentally sensitive area as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments."

Near the southern edge of the subject site is a continuous grove of Eucalyptus trees, planted in the early 1900's. Although Eucalyptus trees are not native to the area, this grove serves a vital biological role in the wetland/upland ecosystem. The Eucalyptus grove totals approximately 20 acres. It is recognized by the Department of Fish and Game as an environmentally sensitive area and has been recognized by the Coastal Commission and the courts as an environmentally sensitive habitat area (or "ESHA"), as defined by the Coastal Act, in Public Resources Code Section 30107.5. In addition, also in close proximity to the subject site, is the Bolsa Chica wetlands restoration area.

The trees that were removed, though not specifically included in the boundary of the previously recognized ESHA, constitute substantial vegetation that contributed significantly to the continuation and enhancement of the sensitive habitat that exists throughout the project vicinity. The removed trees were known roosting and nesting area for raptors (i.e. white-tailed kites). The white-tailed kite nested in the large Monterey pine that was removed. Additional special interest species detected in or adjacent to the project area within the last several years include Cooper's hawk (*Accipiter cooperii*), northern harrier (*Circus cyaneus*), merlin (*Falco columbarius*), American peregrine falcon (*Falco peregrinus*), bald eagle (*Haliaeetus leucocephalus*), and Allen's hummingbird (*Selasphorus sasin*). In

addition, California gnatcatcher (*Polioptila californica*) surveys conducted in the vicinity by the applicant's biological consultant during the 2005 nesting season determined that the focal area and nesting area of a coastal California gnatcatcher breeding territory was adjacent to the study area.

Of the trees that were removed at least one of the Monterey pines was significant in terms of providing roosting and nesting habitat. The Biological Assessment prepared for the site, states that a third tree believed to have been a Chinese fig, appears to have also been removed some years ago. However, photographs taken by Commission staff confirm that the fig was still standing on the site several days before the pine tree was removed.

Replacement of the Monterey Pines with two Monterey Pines including one mature Monterey Pine (as similar as possible in size to the tree that was removed), and a native fruiting tree, and planting them in the same location, is the only way to provide replacement habitat closest to that which was removed. However, the interim impacts of lost habitat that will occur until the replacement Monterey Pines and fruiting native tree achieve the same habitat function as those that were removed must also be addressed.

In addition, the Biological Assessment originally submitted by the applicant must be revised to incorporate the addition of the two Monterey Pine trees and native fruiting tree to the project proposal. The revised Assessment must include specific to the two Monterey Pines and one native fruiting tree, at a minimum, a maintenance and monitoring plan, success criteria, measures to be taken if the success criteria is not met and identification of a qualified individual who will be responsible for all phases of the restoration planting.

The Chinese fig was significant in that it fruited and flowered. The fruiting and flowering attracted smaller birds, which in turn served as prey for the raptors. The western sycamores (*Platanus racemosa*) are expected to provide similar roosting, perching, and potentially, nesting sites as did the Monterey pine. Likewise, the two Catalina cherry trees, which fruit and flower, are expected to attract smaller birds as the Chinese fig did.

The applicant's biological consultant LSA, in the biological assessment prepared for the project titled Biological Assessment Goodell Property, Bolsa Chica Mesa, Orange County, California and dated March 2006 (Biological Assessment), states: "The recommended increase in the number of trees and the enhanced species diversity are intended to replace the previously removed tree habitat and maintain or enhance the raptor and avian foraging, roosting, and breeding potential."

In order to address the loss that the unpermitted tree removal had on the habitat functions of the subject site, the applicant is proposing two western sycamore trees, two Catalina cherry trees and two toyon shrubs. The proposal to establish these four new trees and two new shrubs is intended to aid in off-setting the interim loss of habitat that has occurred between the time the trees were removed and establishment of the new trees to the level of maturity attained by the lost trees.

The Biological Assessment includes a description of the mitigation measures to be enacted to offset the interim habitat loss. However, although it describes the location that

the sycamores, Catalina cherries, and toyons are to occur (“southeast corner of the study area”), the planting location of all the trees is not depicted on a site plan. In addition, although it discusses the need for a “landscape maintenance plan” and provides guidelines for the plan, such a plan has not yet been submitted. The guidelines for the Landscape Maintenance plan adequately address the factors required to assure success of the proposed plantings. The guidelines include the number, type, and size of replacement plantings, and that the Plan will be subject to the review and approval of the Executive Director. It includes a five-year establishment plan, and success criterion, based on height of the plantings at 3 and 5 year intervals, and a requirement of 100% survival 120 days following installation and 100% survival in the fifth year, and standards to follow if 100% survival is not achieved. However, the Landscape Maintenance plan does not appear to be specifically proposed, rather it appears only to be a recommendation of the biological consultant. In order to assure that the interim loss of the trees is adequately off-set the standards outlined in the Landscape Maintenance Plan must be carried out. In addition, in order to assure that the trees are planted in the most appropriate area on site, a site plan reflecting the location of the plantings must be submitted. Therefore, as a condition of approval the applicant is required to submit a Landscape Maintenance Plan consistent with what is outlined in the Biological Assessment, and the applicant is also required to submit a site plan clearly depicting the location where the plantings will occur including the two Monterey Pine trees and native fruiting tree in the same location from which they were removed.

In addition, all the proposed replanting must occur in a timely manner. The interim loss of habitat is on-going until the trees are established and able to provide habitat functions in a manner similar to what existed prior to the removal of the trees. Thus timeliness is critical. Therefore two special conditions are imposed which provide time frames for the planting to occur.

Only as conditioned can the proposed development be found to be consistent with Section 30240 which requires that development in or adjacent to and ESHA be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of the habitat areas.

D. Unpermitted Development

Development, including the removal of major vegetation consisting of one fruiting tree, one Monterey pine and a portion of another Monterey pine used by white-tailed kites for nesting, has occurred on site without the required coastal development permit. This permit only authorizes the proposed restoration activity, not the unpermitted tree removal.

This application was submitted by the applicant in response to communications with the Commission’s Enforcement Division. In order to fully resolve the violation at issue, the applicant is proposing to replace the felled trees and mitigate the impacts to sensitive resources that occurred as a result of the violation.

Special Condition 1 (Landscape Maintenance Plan) has been required to ensure timely and proper implementation of the proposed restoration and mitigation activities. To ensure

that the permit is issued and development is begun in a timely manner, Special Condition 2 (Condition Compliance) requires that the applicant satisfy all Special Conditions which are prerequisite to the issuance of this permit within 60 days of Commission action, or within such additional time as the Executive Director may grant for good cause, and Special Condition 3 (Commencement of Development) requires the applicant to commence the approved development within 60 days of issuance of this permit, unless the Executive Director grants an extension of this deadline for good cause.

Although unpermitted development has occurred, the Commission's determination that this application could be approved has been based solely upon the Chapter 3 policies of the Coastal Act. Approval is intended to resolve the violation, and thus, the Commission agrees that if the applicant undertakes the work proposed in this permit application and complies with the conditions of this permit, the Commission will take no enforcement action predicated on the removal of the trees. Approval does not constitute an admission as to the legality of any development undertaken on the subject site without a coastal development permit.

E. Local Coastal Program

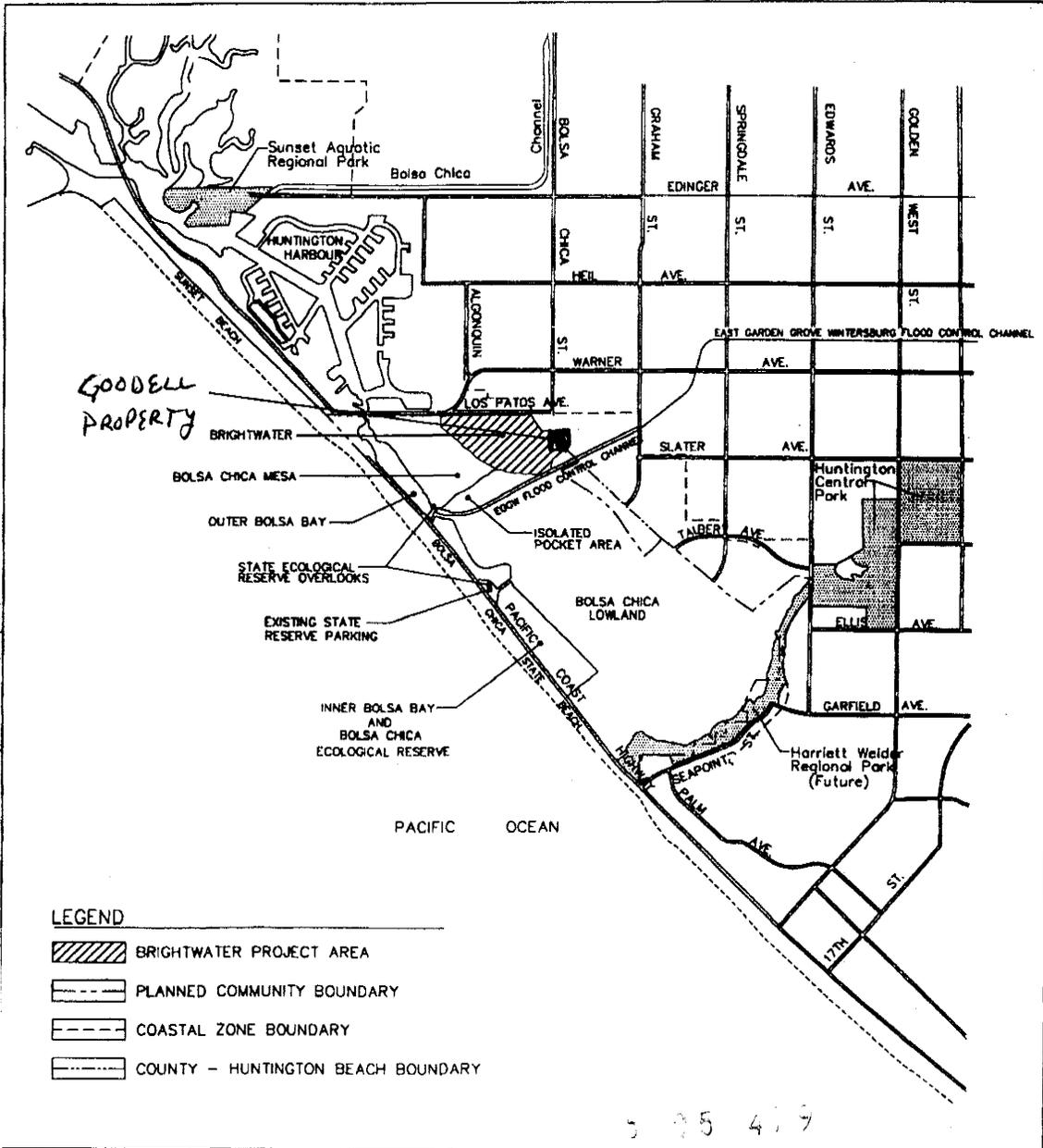
Coastal Act section 30604(a) states that, prior to certification of a local coastal program ("LCP"), a coastal development permit can only be issued upon a finding that the proposed development is in conformity with Chapter 3 of the Act and that the permitted development will not prejudice the ability of the local government to prepare an LCP that is in conformity with Chapter 3. The segment of unincorporated Orange County has neither a certified LCP nor a certified Land Use Plan. As conditioned, the proposed development is consistent with Chapter 3 of the Coastal Act. Approval of the project will not prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3 of the Coastal Act.

F. California Environmental Quality Act

Section 13096 of the Commission's regulations requires Commission approval of Coastal Development Permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project as conditioned has been found consistent with the biological resource policies of the Coastal Act. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project can be found consistent with the requirements of the Coastal Act to conform to CEQA.

Vicinity Map.



COASTAL COMMISSION

5-05-479

EXHIBIT # A

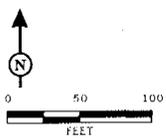
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1979



LSA



SOURCE: LSA (2005)

I:\DGI.530\GIS\vegetation plantings.mxd (06/30/06)

- Approx. Property Boundary
- Agriculture
- Chenopod Scrub
- Dead Tree
- Eucalyptus
- Eucalyptus ESHA

- Fig
- Mulefat
- Myoporium
- Olive
- Palm
- Peruvian Pepper

- Pine
- Previously Cut Tree
- Recently Cut Pine
- Ruderal
- Old Foundation

- Tree Plantings**
- Catalina Cherry
 - ◻ Toyon
 - ▲ Western Sycamore

FIGURE 2

Goodell Property
Vegetation

5-05-479

Exhibit B

FROM : SUEGOODSELL

FAX NO. : 8584819227

Oct. 26 2006 08:40AM P1

Attention: Teresa Henry, California Coastal Commission

Date: October 26, 2006

Re: Application 5-05-479

After consultation with legal counsel there seems to be some question as to the definition of major vegetation and whether we violated the California Coastal Act by removing the two trees.

However, we believe that it is in our best interests to modify our development plan to incorporate the three new trees that your staff outlined over the phone. Our modification will include a mature Monterey Pine, a smaller Monterey Pine and a flowering tree selected by LSA. Furthermore, we agree to plant those trees on the upper mesa adjacent to the trees that were removed and maintain them according to the same plan outlined in our previous application.

We assume that this modification of the original plan will dispose of any enforcement action in the future for the alleged coastal violation.

Respectfully submitted,



Douglas Goodell

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Exhibit C